North Bay Plumbing, Inc. *and* Plumbers & Steamfitters, Local 343, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Case 20–CA–26200

March 19, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 9, 1997, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed exceptions and a supporting brief, as well as an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, only to the extent consistent with this decision, and to adopt the recommended Order as modified. Specifically, we find that the judge erred in failing to find that the Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to consider and hire job applicants Dan Caley, Barry Culloty, and Kyle Wheeler.

The judge found that the General Counsel met the initial burden of proving that unlawful antiunion sentiment was a substantial or motivating factor in the Respondent's refusal to consider, interview, or offer employment as plumbers to each of the eight union members named in the complaint as discriminatees. We agree, based on the evidence that: (1) the Respondent advertised for and hired numerous plumbers during the time period at issue; (2) the eight union members applied in such a manner that it was clear to the Respondent that they were acting in concert, and with an intent, if hired, to organize the Respondent's plumbing craft employees; (3) the Respondent failed to consider, interview in a timely manner, or offer employment to any of these persons, all of whom were qualified to perform plumber's work for the Respondent; and (4) statements by the Respondent's officials indicated their animus towards the Union.

The judge further found that the Respondent failed to meet its resultant burden of persuading that five of the eight union members—Cameron, Lopes, Walters, Bathurst, and Bishop—would not have been hired even absent their union activity. He therefore concluded that the Respondent's failure to consider, interview, or offer employment to these five persons violated Section 8(a)(3) and (1) of the Act. We affirm the judge's findings and conclusions in this regard.

We disagree, however, with the judge's finding that the Respondent did meet its burden of persuading chat the three remaining union members—Wheeler, Caley, and Culloty—would not have been interviewed or hired even in the absence of their union activity. The judge concluded that the Respondent proved its legitimate reliance on a belief that Wheeler was an active competitor in bidding for plumbing contracts and on information that Caley and Culloty had done unsatisfactory work for another plumbing contractor.

Specifically, the Respondent claimed it did not consider Wheeler for employment because Respondent President Lee Pettit knew that Wheeler had been the owner of California Plumbing, a competitor of the Respondent, which bid against the Respondent "every day." Although it is undisputed that Wheeler had ceased operating his own company and was unemployed when he applied for work with the Respondent, the judge found no record evidence that the Respondent generally or Lee Pettit in particular knew of any change in Wheeler's situation. The judge also found that the Respondent's hiring of Frederick Long was distinguishable because Long's plumbing company had been primarily engaged in service and repair plumbing, rather than new residential plumbing installation.

We find error in the judge's findings. First, in Wheeler's May 6 employment application with the Respondent, he wrote "no" in response to the question, "Are you employed now?". Thus, the judge was incorrect in his assessment that Wheeler's application "fully indicat[ed] to the reader that he remained with California Plumbing as of the time of the application." Similarly, the record does not support the judge's assessment that

[1] We find no merit in the Respondent's exceptions either to the taking of investigatory depositions from three management witnesses or to the introduction of these depositions into the record. For the reasons set forth in *NLRB v. North Bay Plumbing*, 102 F.3d 1005 (9th Cir. 1996), we reject the Respondent's contention that the Board does not have the statutory authority and/or administrative rules permitting the issuance and enforcement of precomplaint subpoenas. Furthermore, we reject the Respondent's contentions that the introduction into the record, and the judge's subsequent reliance on, deposition testimony secured by such subpoenas violated due process. The Respondent had the opportunity to examine each of the witnesses during the deposition process. At the unfair labor practice hearing, the Respondent stipulated that these individuals would testify as they had in their depositions. Moreover, contrary to the Respondent's claims, two of the three witnesses involved—the Respondent's President Lee Pettit and its estimator/purchasing agent David Adams (an admitted supervisor)—also testified at the unfair labor practice hearing. In sum, the Respondent has failed completely to demonstrate how it may have been prejudiced by the introduction and use of the depositions.

The Respondent's exceptions make only the procedural arguments discussed here and in fn. 5. It does not otherwise contest the judge's factual or legal analysis supporting his conclusion that the Respondent violated Sec. 8(a)(3) by refusing to consider and hire five applicants because of their apparent intention to organize the Respondent's plumbing craft employees.

[2] The Respondent, the General Counsel, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Long, hired less than 2 months after Wheeler applied for a job, was not a "true competitor" with the Respondent because his company did primarily service and repair work. Long testified that his company also performed new construction residential plumbing—exactly the same work performed by the Respondent. He further testified that he continued to operate his company during the 3 months that he was employed with the Respondent. Furthermore, on August 15, the Respondent hired Albert Chano, who indicated on his application that he was self-employed as a plumber at the time.

In light of this evidence, we find that the Respondent has failed to prove that it had a reasonable basis for believing that Wheeler remained its business competitor when he applied for a job. It also failed to prove that it would not hire active business competitors who applied for work. In sum, the Respondent has failed to prove that it would not have considered, interviewed, and hired Wheeler in the absence of his union affiliation.

With respect to alleged discriminatees Caley and Culloty, the Respondent claimed that it did not interview or consider them for employment because they had been unsatisfactory employees for Nor Cal Plumbing, a now-defunct company of which Lee Pettit had been president. The judge credited the testimony of the Respondent's estimator/purchasing agent David Adams (and admitted supervisor) that he told Lee Pettit soon after the eight union members had applied for employment that he recognized Caley and Culloty among the applicants and that the two had nor been satisfactory employees at Nor Cal. The judge further credited Lee Pettit that this information was the reason he did not interview or offer employment to Caley and Culloty.

Once again, the record on the Respondent's hiring practices fails to support the judge's analysis of the real reasons for the Respondent's actions. Both Lee Pettit and Adams testified that poor performance did not necessarily preclude the Respondent from hiring a former employee. Lee Pettit testified that the Respondent had rehired Rick Aranda, an employee who had been previously discharged because "his production was way down and he was undependable . . . (and) his work wasn't up to the standards that it should have been." Pettit further testified that the Respondent had rehired Ora Bernard despite the fact that he had been previously discharged for drug use affecting his work performance. In Lee Pettit's words, Bernard would "walk in the door and couldn't hit it in the mornings."[3]

There is no proof that Caley and Culloty's alleged shortcomings when working for Nor Cal were more severe than those of Aranda or Bernard, whom the Respondent rehired. If anything, the record suggests that Aranda and Bernard were the greater reemployment risks. There is no apparent lawful basis for the disparity in treatment of applicants with similar unsatisfactory prior employment histories. Under these circumstances, it is permissible to infer that the Respondent's claimed reliance on Caley and Culloty's work at Nor Cal was mere pretext. At the least, we find that the Respondent has failed to prove that it would have relied on this factor in refusing to consider, interview, or hire these two individuals if they had not been associated with the Union.[4]

Based on the above, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider, interview, or offer employment to applicants Wheeler, Caley, and Culloty. We shall modify the judge's recommended remedy to include provisions that they receive the same affirmative relief as the other discriminatees .[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, North Bay Plumbing, Inc., Fairfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire and failing and refusing to interview and offer employment to job applicants because the applicants intend to engage in protected union organizing activities.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Bathurst, Anthony Bishop, Rodney Cameron, Daniel Caley, Barry Culloty, Robert Lopes, Robert Walters, and Kyle Wheeler positions as plumbers, terminating, if necessary, any plumber employees hired on or after May 6, 1994.

[3] The Respondent's witnesses did not testify, as the dissent suggests, that the Respondent rehired Aranda or Bernard because it was "desperate" for plumbers. Adams did testify generally that he would rehire even the least capable former employee if he were desperate enough.

[4] Contrary to the dissent, we neither reverse nor disregard the credibility resolutions of the judge. We accept the facts that Adams expressed a negative view of both Caley and Culloty and that Petit relied on this view. However, in light of the evidence supporting the General Counsel's prima facie case (which our dissenting colleague does not dispute), this credited testimony begs the overarching motivational question as to why Petit relied on Adams' statement. This question cannot be answered without consideration of the record as a whole. Having considered the entire record, we find that the Respondent has failed to prove that Adams' assessment of the two former employees' prior work record would have barred their consideration for rehire even in the absence of their support for the Union.

[5] We find no merit in the Respondent's argument in exceptions that the automatic stay provisions of the Bankruptcy Act (11 U.S.C. 3–62(a)), bar any further proceeding for enforcement of this remedy. It is well established that Board proceedings fall within an exception to the automatic stay provision. See *Isratex, Inc.*, 316 NLRB 135 fn. 1 (1995), and cases cited there.

(b) Within 14 days from the date of this Order, make the above-named individuals whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider and hire the above-named individuals, and within 3 days thereafter notify each of them in writing that this has been done and that the refusal to consider and hire them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its business office and other places where notices to its employees are customarily posted copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, concurring and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) by refusing to hire applicants William Bathurst, Tony Bishop, Rodney Cameron, Robert Lopes, and Walter Walters.[1] For the reasons stated below, I also agree with the majority that the Respondent unlawfully failed to hire applicant Kyle Wheeler. Contrary to the majority, however, I conclude that the Respondent did not unlawfully refuse to hire applicants Dan Caley and Barry Culloty.

With regard to Wheeler, I agree with the judge and my colleagues that the General Counsel established a prima facie case that the Respondent refused to hire Wheeler because of his union membership or activities. Thus, Wheeler engaged in union activities when applying for work, and the Respondent was well aware of this activity. Further, Wheeler was qualified for the journeyman pipefitter positions for which the Respondent advertised, and which it subsequently filled with later applicants.

I further find that the Respondent failed to rebut this prima facie case by establishing that it would not have hired Wheeler regardless of his union activities. I first reject the Respondent's defense that it lawfully refused to hire Wheeler because he operated a competing company. The evidence establishes that the Respondent hired plumbers who operated their own companies. Thus, within 2 months of Wheeler's application, the Respondent hired applicant Frederick Long who—with the Respondent's knowledge—owned and continued to operate a competing plumbing company. Further, within months of hiring Long, the Respondent hired another self-employed plumber, Albert Chano.

In any event, I also reject the judge's conclusion that the Respondent believed that Wheeler was operating a competing plumbing company at the time of his application. Wheeler wrote on his application that he was not currently employed. Further, even if reporting his ownership in California Plumbing from "89–94" on the application, without providing the requested "reason for leaving," might have created some uncertainty, the Respondent easily could have resolved it during an employment interview. As the judge concluded with regard to discriminates Bathurst, the Respondent cannot "assert its ignorance of the matters it should have learned of in such an interview to justify it[s] failure to offer [him] employment."

In light of the foregoing, I agree with my colleagues that the Respondent failed to rebut the prima facie case that it unlawfully refused to hire Wheeler.

As to Caley and Culloty, I find that the General Counsel established a prima facie case, for the reasons discussed above for applicant Wheeler. Contrary to my colleagues, however, I agree with the judge that the Respondent rebutted that case by demonstrating that it would not have hired Caley and Culloty regardless of their union activity. Thus, the judge specifically credited estimator Adams that, after the eight union applicants applied for work, he told Lee Pettit that he recognized Caley and Culloty as unsatisfactory employees formerly employed by Pettit's defunct company, No-Cal. The judge further credited Pettit, who made the decisions whether to interview and hire. Pettit testified that, because of Adams' representations, Caley and Culloty would not be interviewed or hired. Indeed, as found by

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The only exceptions to these 8(a)(3) findings are procedural ones which, for the reasons stated by my colleagues, I reject.

the judge, Pettit's explanation was particularly credible because "Adams' report [ ] to Pettit in response to his query about [Carey and Culloty] is essentially coterminous with Pettit's initial decision about the two applicants and should not be lightly discounted." Similarly, the credibility resolutions of the judge should not be lightly disregarded.

I agree with my colleagues that the "overarching" question is one of motive. However, under Board law, that question is to be decided under *Wright Line*, 251 NLRB 1583 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that case, a prima facie case of improper motive can be rebutted. Given the credibility resolutions, it is clear to me, as it was to the judge, that the Respondent relied upon Adams' statement to Pettit, and that the Respondent would have refused to hire the two employees even if they had not engaged in union activity.

Finally, I do not agree with my colleagues that the fact that the Respondent, on other occasions, has considered or rehired less-than-exemplary former employees is a sufficient basis for setting aside the judge's credibility-based findings. Indeed, when resolving credibility, the judge expressly considered arguments that the Respondent, on other occasions, may have hired plumbers with less-than-exemplary credentials. I find that nothing in my colleagues' discussion warrants reversing the judge. In essence, my colleagues compare the shortcomings of these hired plumbers with the shortcomings of the alleged discriminatees. However, that is not a comparison for my colleagues to make. Respondent made the comparison based on its assessment of the relative merits of the employees. I would not second-guess that judgment. Further, the fact that the Respondent has hired less-than-exemplary plumbers, in circumstances where it was "desperate" for plumbers, is neither determinative nor comparable here. There is no showing that the Respondent was similarly "desperate" for plumbers at the time of these applications. Indeed, the Respondent seemed to have an ample supply of applicants.

Accordingly, I would dismiss allegations that the Respondent violated Section 8(a)(3) and (1) by failing to hire Caley and Culloty.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Employers subject to the National Labor Relations Act must consider applicants for hire free from any discrimination based on those applicants' union activities which activities include the applicants' support for or intention to organize on behalf of the Plumbers & Steamfitters, Local 343, United Association of the Journeymen and Apprentices of the Plumbing and Pipefitting Industry of America and Canada, AFL–CIO.

WE WILL NOT fail and refuse to consider for employment, to interview, or to hire plumber applicants who support the Plumbers & Steamfitters, Local 343, United Association of the Journeymen and Apprentices of the Plumbing and Pipefitting Industry of America and Canada, AFL–CIO, or who indicate that they will attempt to organize our employees on the Union's behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer employment as plumbers to the following plumber job applicants, terminating, if necessary, any plumber employees hired on or after May 6, 1994:

William Bathurst
Anthony Bishop
David Caley,
Rodney Cameron
Barry Culloty
Robert Lopes
Robert Walters
Kyle Wheeler

WE WILL make the above-named individuals whole for all losses of wages and benefits they suffered as a result of our failure to consider and offer them employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for hire and hire the above-named individuals, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the prior handling of their applications will not be used against them in any way.

NORTH BAY PLUMBING INC.

Marilyn O'Rourke, Esq., for the General Counsel.
Mark Thierman, Esq., of San Francisco, California, for the Respondent.
Diane Sidd-Champion, Esq. (McCarthy, Johnson & Miller), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This case was tried in San Francisco, California, during the week of July 15, 1996. The charge was filed by the Plumbers & Steamfitters, Local 343, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the Union or the Charging Party) against North Bay Plumbing, Inc. (the Respondent) on July 14, 1994.[1] A complaint and notice of hearing was issued by the Regional Director for Region 20 of the National Labor Relations Board on February 29, 1996. Posthearing briefs were due on August 22, 1996.

The complaint alleges, and the answer denies that, on and after May 6, 1994, the Respondent failed and refused to consider for hire, or hire, eight individuals because of their support for and assistance to the Union, and discouraged its employees from engaging in concerted activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and the briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent has been a California state corporation with an office and place of business in Fairfield, California, where it has been engaged in the business of installing residential plumbing. During calendar year 1994, Respondent, in conducting its business, provided services valued in excess of $50,000 to enterprises within the State of California, each of which meets the Board's standards for the assertion of jurisdiction on a direct basis.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent has been incorporated since the early 1980s and is primarily engaged in the business of installation of residential plumbing in Solano and adjacent California counties. The Respondent's president is Elmer Lee Pettit (Lee Pettit) whose wife owns the corporation. Patrick Pettit, son of Lee Pettit, is the Respondent's superintendent and David Adams is its estimator/purchasing agent. The Respondent's employees have never been represented for purposes of collective bargaining.

Lee Pettit was also president of a separate entity, Nor Cal Plumbing, which had a collective-bargaining relationship with the Union from 1965 until 1987. That entity ceased operations in 1989. The Union and Mrs. Lee Pettit have been involved in substantial and protracted litigation respecting disputed obligations to the Union.

Plumbers and plumbers' helpers are the Respondent's primary employees but its craft work is not highly structured and all employees pitch in to do work as needed. The Respondent handles hiring on a relatively informal basis. Applicants are generated by use of the State of California's employment services, newspaper advertising, employee suggestions, and walk-in applicants. Applicants are interviewed by either of the Pettits or Adams. Lee Pettit is usually consulted respecting the hire of a given individual. While applications are normally filled out, some employees have been hired without completing an application form and completed application forms are not maintained by the Respondent indefinitely.

In very simple terms, the plumbing trade may be divided into three broad categories of work: residential, commercial, and industrial.[2] Residential plumbing involves the installation of new plumbing in homes, and is generally the simplest and most repetitive type of plumbing work with an emphasis on speed and economy of operation. Commercial plumbing deals with the installation of plumbing in commercial buildings and is generally more complex than residential plumbing. Industrial plumbing covers the wide range of plumbing involved in industrial buildings and processes and generally involves the highest degree of skill and experience.

B. Events

1. The submission of applications

In the first week of May 1994, the Respondent placed a help wanted advertisement in the Vacaville Reporter, a local newspaper, which stated:

> JOURNEYMAN plumbers wanted
> for local contractor. Apply at
> North Bay Plumbing Inc.,
> 1651 Cement Hill Rd, Fairfield

The advertisement caught the eye of Rodney Cameron, chief organizer for the Northern California/Northern Nevada Pipe Trades District Council No. 51 and business agent for the Charging Party.[3] Cameron contacted the Union's business manager, Michael Beavers, told him about the advertisement, and asked him to provide a list of qualified union member plumbers. Beavers did so. Cameron reached then-unemployed plumbers William Bathurst, Anthony (Tony) Bishop, Daniel Caley, Barry Culloty, Kyle Wheeler, and District Council Organizers Robert Lopes and Robert Walters, informed them that he intended to apply for and accept work with the Respondent, and solicited their participation in this effort.[4] The seven

[1] The Respondent is and has been at all relevant times, an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Cameron testified he had responded to a similar advertisement in November 1993, and applied for a position with the Respondent. At that time he spoke to Patrick Pettit who took his application but when asked about "other union brothers" applying for work said "they didn't want anybody stirring up the troops there at North Bay Plumbing. They could make application but they probably wouldn't get hired." Patrick Pettit gave a precomplaint deposition in which he described the conversation with Cameron in 1993, but did not recall the "hire" remarks attributed to him.

[4] While there are certain limitations on union members working for "non-union" contractors, Cameron explained to the individuals that the planned action was permissible under the "salting" or organizational provisions of the Union's governing provisions.

agreed to participate with Cameron. The eight individuals counting Cameron in the total (sometimes hereinafter referred to collectively as the eight) met on the morning of May 6, donned union pins and hats,[5] and drove to the Respondent's offices.

The eight entered the Respondent's office, requested and received blank job applications, completed them on site and submitted them to the office secretary requesting and receiving photocopies for their retention. The applications were received in evidence. The eight applicants wrote "plumber" on their job applications for "employment desired." All listed previous plumbing employment under "former employers." Lopes, Cameron, and Walters wrote on their applications that they were employed as organizers by the District Council. The other applicants wrote on their applications that they were "voluntary organizers" for the Union. After submitting their completed applications the eight left.

Cameron, corroborated by Bathurst, and Walters, testified that during this process Cameron asked David Adams about the Respondent's need for plumbers. Adams said that the company had quite a bit or a lot of work. Cameron then asked how many people the Respondent needed, and Adams said two or three people right away. Adams did not recall this conversation with Cameron and expressed doubt he would have made the statements attributed to him.

Rick L. Barstad, at the time a foreman for the Respondent, testified that somehow he learned of the eight's actions and, at the end of his field work on the same day he returned to the office and asked Adams about it. Barstad testified:

> I said to Dave [Adams], I said, I heard some union plumbers came into the shop looking for work. And I said, you know, are we going to hire any of these guys? And Dave said, no, I wouldn't hire any of these guys on a bet.

Adams did not address this conversation in his testimony.

2. The Respondent's hire of plumbers in and after May 1994

The parties stipulated that some 24 individuals were hired and started work for the Respondent during the period May 9 through July 11. The Respondent identified most of these new hires as plumbers, helpers, laborers, and backhoe operators. The four Respondent-identified plumbers who began working during this period were paid a wage of $15 or $16 per hour, while the 11 helpers were paid various rates with 5 earning $15 per hour, 2 earning $14 per hour and the others less. Thereafter, through 1994 and 1995, many other plumbers were hired.

After leaving the Respondent's premises on May 6, 1994, none of the eight was contacted by the Respondent for approximately a year. In 1995 the Respondent sent letters to various of the eight with varied success in reaching them. It also interviewed Anthony Bishop for employment.

3. Evidence of the Respondent's consideration of the eight applicants for interviews or employment

Adams testified in his Board deposition, that he was asked about the eight applicants and shown a few of their applications by Lee Pettit a day or so after the eight had visited the facility. He recognized three names and told Lee Pettit what he knew of Dan Caley, Barry Culloty, and Rod Cameron. Adams recalled telling Pettit that Culloty and Caley had worked for him at Nor Cal and that he viewed Culloty as slow in production and Caley as irresponsible. He told Lee Pettit that he recognized Cameron's name but otherwise had no knowledge of his work or experience.

Lee Pettit, in his Board deposition, testified that at relevant times he believed Kyle Wheeler to be the owner of a direct competitor enterprise, California Plumbing. He testified: "He bids against me every day," and indicated that was the reason he did not further contact, interview or offer Wheeler a job.

Pettit testified in essence that the three union officials, while qualified to work for the Respondent, were not sincere job applicants and for that reason he gave them no consideration. More specifically, he testified that while Robert Walters was not personally known to him and his application listed experience which seemed to justify an interview and further consideration, his application also indicated he was "already employed for $30 an hour, and there's no way in my opinion that he's going to accept a job from me and give that one up." Lee Pettit testified about Rodney Cameron:

> He is presently employed, and he is a business agent and why, in my opinion, am I to believe that he seriously wants a job with me for a lot less money?
>
> . . . .
>
> The man is a business agent and he's not looking for a job. He's not interested in coming into my company and going to work for less money and giving this job up and becoming a good, steady, dependable employee.

Pettit equated Bob Lopes' application and circumstances with those of Cameron and Walter's. Thus, Lee Pettit testified that he did not consider offering employment to any of the three because he did not believe that Walters, Cameron, or Lopes would "give up" their better paying union jobs to come to work for the Respondent as a substantially lesser wage.

Lee Pettit testified that William Bathurst's application did not justify interviewing nor hiring him:

> Because I judge this man to be more commercial than residential. And in my opinion, his experience has been in the commercial industry and he could not fit what I had to offer at that time.

Respecting Daniel Caley, Lee Pettit testified he did not interview Caley because he had previously worked for Nor Cal and had been discharged by Adams from that position for lack of production and missing time at work. Lee Pettit testified similarly respecting Barry Culloty, that he was not hired because of Adam's work experience with him. Caley and Culloty each testified that he had not been discharged for cause during his employment at Nor Cal, but rather had been laid off for lack of work in the normal course of affairs.

Essentially no testimony was received respecting the Respondent's pre-May 1995 consideration of Tony Bishop's application. Adams did not know him. Lee Pettit testified that in May 1994, he did not recognize the name of Tony Bishop, but upon interviewing him in May 1995, recognized his face as someone he knew from times past without being able to identify the basis for his familiarity.

[5] One of the caps bore the legend "AMERICA WORKS BEST WHEN WE SAY UNION YES" and displayed the Union's logo. Another cap displayed "UA" in large letters and carried the Union's logo. One button said: "ORGANIZING UA COMMITTEE," another: "ALL THE WAY WITH THE U.A. THERE IS NO SUBSTITUTE FOR U.A. SKILLED CRAFTSMEN."

C Analysis and Conclusions

1. The analytical framework

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric*, Inc., 321 NLRB 278, 280 fn. 12 (1996):

> Under [the *Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557–2558 (1994)] supra at 2558.

The complaint allegations that the Respondent improperly failed to consider, which in this context includes a failure to offer to interview and to offer employment to the eight, must be evaluated utilizing that analytical framework.

2. The General Counsel's case

The General Counsel has established three important threshold facts. First, the Respondent was advertising for journeymen plumbers at the time the applicants applied for employment and in the period thereafter the Respondent hired numerous plumbers. Second, the eight applicants submitted employment applications in circumstances making it clear to the Respondent's agents they were acting in concert and with an unambiguous intent, if hired, to attempt to engage in organizing activities among the Respondent's plumbing craft employees.[6] Third, the General Counsel has established that the eight had the qualifications to perform plumber's work for the Respondent.[7]

The government has also established the Respondent's animus against the Union and the idea of the Respondent's employees selecting the Union as their representative for purposes of collective bargaining. Crediting Barstead's[8] testimony regarding his conversation with Adams on the day the applicants visited the Respondent's premises, I find that the word had gone out that "union plumbers" had sought work with the Respondent and that Adams, at least, expressed the opinion he "wouldn't hire any of these guys on a bet."

Lee Pettit, at the time in question, had been in litigation with the Union and could fairly be said to be opposed to having his employees select the Union to represent them in collective bargaining. Various remarks were attributed to Lee Pettit which I credit that indicated hostility to the Union's efforts to obtain a monetary judgment against Pettit and his wife based on contested matters arising out of the Union's representation of Nor Cal's employees.

The Respondent argued that it was indifferent to the union membership of the employees it hired and that it had hired union members heretofore. I do not find these assertions inconsistent with a finding, which I make, that the Respondent was opposed to the Union's representation of its employees and therefore opposed to hiring any job applicants who it believed would attempt to organize its employees.

In this context Lee Pettit, in May 1994, considered the applications of the eight and, despite have a running newspaper advertisement seeking journeyman and despite hiring various individuals as plumbers in the following weeks and months, found none of the eight worthy of followup contact, interview, or job offer.[9]

As noted, it is clear that the Respondent was seeking plumber applicants, hired plumber applicants through the period, recognized that the eight individuals involved herein were intending to organize the Respondent's employees, and did not hire, interview, or offer them employment despite their apparent qualifications. A failure to consider or hire an employee applicant because that applicant is believed intent on organizing an employer's employees is a violation of Section 8(a)(3) and (1) of the Act.

I find and conclude that the evidence summarized above sustains the General Counsel's burden to persuade that the Respondent failed and refused to consider, interview, or offer employment to each of the eight applicants because of the Respondent's belief that any and all of the eight job applicants would attempt to organize the Respondent's plumbing craft employees on behalf of the Union.

3. The Respondent's affirmative defense that it would have taken the same action even if the applicants had given no basis for belief that they were union supporters or intended to organize the Respondent's employees[10]

Having found the counsel for the General Counsel has sustained her initial obligation under *Wright Line*, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would not have considered, interviewed, or offered employment to the eight, even if the applicants had not applied in a manner indicating they had or were not suspected by the Respondent of having intentions to attempt to organize the Respondent's employees. The Respondent asserts various defenses: some of which address all of the applicants as a whole, and others which address individual applicants. They will be considered in turn.

[6] I reject the Respondent's argument that the earlier actions of the Union respecting the Respondent made it unlikely that these individuals, if employed by the Respondent, would in fact attempt to organize the Respondent's work force. I also reject Respondent's argument that the its agents would not have taken the eight at their word in this regard. I specifically find, based on the conduct of the eight and the record as a whole, that Respondent's agents in fact believed that organizing efforts of behalf of the Union would in fact occur if any of the eight was hired.

[7] I specifically find that each of the eight was qualified to perform the type of work on offer at the Respondent. Further, based on the testimony of the qualifications of the individuals, the testimony regarding the work done in the industry and the qualifications of the employees hired in the past by the Respondent, I find that none of the eight was so "overqualified" or specialized in nonresidential construction or installation plumbing that the Respondent would not have considered them for employment on that basis simply by examining their applications.

[8] Barstead had a very sound demeanor and a clear recollection of events.

[9] One interview of an applicant was conducted approximately one year later as the unfair labor practice charges herein matured. I find that interview and what occurred in May 1995 is sufficiently removed from the events in controversy so as not to constitute significant evidence of the alleged violations. The evidence of these 1995 events may be relevant to the compliance stage of these proceedings.

[10] The Respondent's arguments are taken from its argument during the course of the trial. It did not submit a posthearing brief or argue the case orally.

a. The Respondent's common defenses

The Respondent argues that the eight, in announcing an intention to organize the Respondent's employees, were not engaging in protected activity or, in the alternative, the Respondent did not believe the applicants in fact intended to organize its employees because the Union had, in the past, not been willing to demand recognition of the Respondent. Further, the Respondent argues that, because the eight would not in fact have attempted to organize the Respondent's employees, but rather would have solicited the Respondent's employees to leave the Respondent's employ and seek employment with other employers under contract with the Union, that the eight were, if anything, intending to engage in unprotected activity for which the Respondent could properly discharge them.

Irrespective of whether or not the Union acted in the past as the Respondent contends, claims which the General Counsel and the Charging Party strongly dispute,[11] the eight made no assertions respecting any conduct other than that of attempting to organize employees, i.e. acting as "organizers," and the Respondent may not rely on broader notions based on argued past conduct of the Union to render the applicant's union affiliations or assertions of "organizer" interest unprotected by virtue of speculations concerning the future intentions of the Union.

The Respondent also argues that, because the Union was in litigation with Mr. and Mrs. Lee Pettit and the Respondent, organizing attempts on behalf of the Union were unprotected or that the Respondent was permitted under these circumstances to refuse to consider and/or hire union members, advocates and union officials and employees. The General Counsel and the Charging Party argue vociferously that there is no such exception to the general protections of the Act, and that labor organizations are often in contest with employers without union supporting employees or job applicants losing the protections of Section 8(a)(3) and (1) of the Act. I agree.

b. The Respondent's defenses as to individual applicants

(1) Union employees Cameron, Lopes, and Walters

Lee Pettit testified that he did not interview or offer employment to any of the three union officials because they were paid substantially more than was on offer from the Respondent and he judged them not to be seriously interested in giving up such employment and becoming "good, steady, dependable" employees of the Respondent. It appears that the Respondent's argument concerning the reason for declining to offer them employment turns not so much on the amount that these three individuals had been paid in the past so much as the fact that they were still employed in such a high wage position at the time they submitted their applications. Thus, Lee Pettit testified in his deposition under questioning by the counsel for the General Counsel:

> Q. Do you ever hire people who put on their application that they made more in their current or previous job than you pay at North Bay Plumbing for a plumber? [Intervening comments of counsel for the Respondent omitted.]
>
> THE WITNESS. I possibly have, but they w[ere] not employed at that time. And what they made in the past I don't care.

The Respondent argues that a determination not to hire applicants currently paid substantially more than would be offered them for employment with the Respondent is a business decision free of discriminatory or illegal intent. The General Counsel argues that by suggesting that it need not hire a paid union official the Respondent is simply attempting to reverse the Supreme Court's unanimous decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), 116 S.Ct. 450, 133 L.Ed.2d 371 (1995), holding that union officials and other union loyalists are entitled to protection under the Act.

I disagree with the General Counsel's position that *Town & Country* resolves the issue as raised by the Respondent. If an employer has a rule or practice of not hiring job applicants that are currently employed at wages substantially higher than those available at that employer, such a rule in benign[12] circumstances could be applied to justify not hiring or further considering labor organization officials who are currently employed at higher wages. *Town & Country* and the many Board cases addressing the application of the Act to individuals with union associations do not in my view do more than establish that there are no statutory impediments to treating such individuals like other employees or employee applicants.

I find the issue raised by the Respondent is one of fact. Thus, I accept the proposition that, if the Respondent is able to meet its burden of persuasion to prove its affirmative defense that it would not contact, interview or hire any plumber applicant however otherwise qualified, who was currently employed by another employer at a substantially higher wage, the Respondent could well establish that it had properly declined to offer employment to these three individuals.

The problem for the Respondent is that Lee Pettit clearly did not assert that he was following such a past practice, or that the union officials' current high wage employment was the basis for his not interviewing or hiring them. Thus Pettit testified further under examination by counsel for the General Counsel:

> Q. Okay, so is it correct you're saying then if they're currently employed for more money you do not hire them?
>
> A. I didn't say that.
>
> Q. Or interview?
>
> A. I said in —
>
> Q. Okay, explain it —
>
> A. —my opinion —
>
> Q. —to me.
>
> A. . . . the man is a business agent and he's not looking for a job. He's not interested in coming into my company and going to work for less money and giving this job up and becoming a good, steady, dependable employee.
>
> Now these are the way[s] I evaluate who you call in and who you don't call in. And I have clarified for you before, I don't care if he's union, nonunion, black, white, yellow or gold. Matters not. But I'm also a sensible person.

[11] Were it necessary to decide, based on the record as a whole and in agreement with the arguments of the General Counsel and the Charging Party, I would find that the evidence offered by the Respondent to show that the Union had no intention to organize the Respondent was inadequate to support such an argument.

[12] Rules which are in fact or in application designed to rule out applicants because of their protected or union activities, even if facially neutral, would not be valid. See *Tualitin Electric, Inc.,* 319 NLRB 1237 (1995).

I find the quoted explanation Lee Pettit gave for not further contacting, interviewing, or offering employment to the three Union employees, distills down to his belief that well paid labor organization employees could not be serious about being employees of the Respondent.[13] The Board has made it clear that, where an employer argues that a labor organization official or organizer would not in fact have accepted a position with the employer and therefore the employer need not have offered the union applicant such a position, the employer must do more than simply speculate concerning the individual's actual intentions. Thus, the Board finds that, where the question of whether or not an individual would have accepted employment could not be answered because of the employer's wrongful refusal to offer employment to the applicant, any doubts must be resolved against the wrongdoer whose actions created the doubt. The Board has explicitly applied that requirement to an employer who claimed a union organizer would not have accepted a position with it in *Arrow Flint Electric Co.,* 321 NLRB 1208 (1996). Applying that case to the facts herein, the Respondent has not established a valid reason for not offering employment to the three union officials.

Based on all the above and the record as a whole, I find that the Respondent has failed to meet its burden of persuasion that the three Union employees would not have been hired had they not been perceived by the Respondent as likely to attempt to organize the employees of the Respondent.

(2) Kyle Wheeler

Lee Pettit testified that at relevant times he knew Kyle Wheeler to be the owner of California Plumbing, a competitor, which bid against the Respondent for jobs and therefore did not further consider him for employment. The General Counsel and the Charging Party emphasize both that Wheeler at the time he applied for work with the Respondent no longer ran California Plumbing and that the Respondent had hired Frederick Long in the summer of 1994 knowing that at the time of his hire he was the owner of Above All Plumbing. Thus they argue that Pettit's asserted reason for not hiring Wheeler was simple pretext.

I do not find the fact that Long was hired as an owner of a small company primarily doing service and repair plumbing—an entity not identified on this record as a true competitor of the Respondent—to be fatally inconsistent with Pettit's testimony that he did not want to hire the owner of a competitor who bid against his company "every day." Nor do I find the fact that the Respondent had hired other individuals who possessed contractor's licenses or who had been self employed in the plumbing trade during periods of their unemployment or after their businesses had failed or were experienced slow times, is inconsistent with Pettit's testimony.

I also do not find there is record evidence that the Respondent generally or Lee Pettit in particular was ever made aware of Wheeler's loss of employment or that he was no longer running California Plumbing at the time he applied for work. Wheeler's application recites he was the owner of California Plumbing in the period "89–94" and leaves the application box "reason for leaving" blank fairly indicating to the reader that he remained with California Plumbing as of the time of the application. Pettit was not crossexamined on his assertion that Wheeler was thought by him to be the owner of California Plumbing at the time he applied for employment.

I find that Lee Pettit's testimony respecting Wheeler is not inconsistent with the evidence adduced by the General Counsel and is credible. Therefore I find that, at the time of Wheeler's application and thereafter, Lee Pettit believed Wheeler was the owner of a business competitor of the Respondent in the important and primary sense of a frequent bidder on and therefore in direct competition for the same jobs that the Respondent bid on. It is plausible that one business would not desire to employ the owner of a competitor for a variety of valid commercial reasons unrelated to issues of union representation. I am persuaded that the Respondent would have declined to employ Wheeler in all events believing him to be the current owner of California Plumbing. I therefore find that the Respondent has established that it would not have hired Wheeler, even had it had no knowledge or belief that he intended to organize the Respondent's employees or had made common cause with other job applicants who so intended.

(3) Caley and Culloty

Adams testified he told Lee Pettit, within a day or two after the eight had applied for employment with the Respondent, that Culloty and Caley had worked for Nor Cal and that he viewed Culloty as slow in production and Caley as irresponsible. Lee Pettit testified that he did not interview of offer work to Caley because of Adam's experience with him. In his deposition he testified that Adams had earlier fired Culloty as a Nor Cal employee "for being insufficient to handle the duties assigned him" and asserted his knowledge of that fact was the reason he did not interview or offer employment to Culloty.

The General Counsel and the Charging Party argue that the Respondent's asserted reasons for not hiring these two individuals are simple fabrications. Thus, they note that neither employee was told he was being discharged for cause as opposed to being simply laid off at the end of his employment at Nor Cal and there were no employer records offered into evidence indicating their discharges were for cause. It is not always true, however, that employees are informed of an employer's dissatisfaction with their work at the time they are laid off. Further, it is not so much the truth of Adam's opinions about these men that is relevant so much as what he told Lee Pettit about the two in May 1994 and Lee Pettit's belief in Adam's assertions and deferral to his opinion. Honest reliance by an agent of management on the negative opinion of another concerning a job applicant in declining to hire him or her is sufficient to justify the decision taken absent other circumstances.

Important to the resolution of the dispute concerning Caley and Culloty, I credit Adam's testimony that he told Lee Pettit soon after the eight applied for employment that he recognized these two men among the eight applicants and that the two had not been satisfactory employees at Nor Cal. Given that finding, I also credit Lee Pettit's testimony that he learned of Adam's experience and opinion of the two and for that reason would not have interviewed or offered employment to either of them in all events.

The General Counsel and the Charging Party also assert that, whatever the negative opinions and evaluations that might have been reported to Pettit about these two individuals, the Respondent had hired plumbers with less sterling credentials and the

[13] The General Counsel and the Charging Party argue convincingly on brief that to the extent Pettit's argument is that he needed steady or long term employees, the Respondent has a practice of hiring employees knowing they would be short term and using them for as long as they were available.

Respondent should not be allowed to rely on such general statements of disapproval to justify rejecting the two men's applications. I realize the Respondent bears the burden of persuasion at this stage of the analysis, but find that Adam's report given to Pettit in response to his query about the applicants is essentially conterminous with Pettit's initial decision about the two applications and should not be lightly discounted.

Based on all the above and the record as a whole and while the issue is a close one, I find and conclude that the Respondent has met its burden of persuasion that it would not have hired Messrs. Caley and Culloty even had it had no knowledge or belief that they intended to organize the Respondent's employees or had made common cause with other job applicants who so intended.

(4) William Bathurst

Although Bathurst has experience in plumbing for contractors, he also had 6 years of experience in the trade as an instructor for the local plumbing trades apprenticeship program. His application however listed four construction or plumbing companies and did not disclose his instruction experience. As noted supra, Lee Pettit asserted Bathurst's experience was too commercial to justify further inquiry or the granting of an interview.

The General Counsel points out that Pat Pettit testified that the experience listed on Bathurst's application would have merited an interview. Further the General Counsel argues, in an interview, the Respondent would have learned of Bathurst's residential plumbing knowledge and experience. The General Counsel argues that since the Respondent wrongfully denied Bathurst an interview, it may not assert its ignorance of the matters it would have learned of in such an interview to justify it failure to offer Bathurst employment. Finally the General Counsel and the Charging Party note that the Respondent frequently hired plumbers with less experience and training than was evident on Bathurst's application.

I agree with the General Counsel that the Respondent should be held to have known all that it reasonably would have learned in an interview for purposes of determining the propriety of the Respondent's failure to offer employment to the job applicant, if that interview was wrongfully withheld. Crediting Pat Pettit over Lee Pettit, as well as in consideration of the evidence respecting the various types of work within the plumbing industry and the evidence of the qualifications of the employees hired by the Respondent at relevant periods, I agree that Bathurst's skills and experience as they appeared on his application would have merited an interview from the Respondent and that the interview was therefore wrongfully withheld. Lee Pettit's rather cryptic rejection of Bathurst as too commercial and that "he could not fit what I had to offer at that time" was far to certain a rejection at the preinterview stage of the application process given the Respondent's track record of hiring to that time. I further find that had an interview or inquiry been made by the Respondent, it would have determined Bathurst's skills and experience would in fact have "fit" what the Respondent had to offer. Accordingly, I find the Respondent has not met its burden in sustaining its affirmative defense that it would not have interviewed nor offered Bathurst employment, even had he not been viewed as a union organizer or associated with the others who intended to organize the Respondent's employees.

(5) Anthony Bishop

Anthony Bishop was interviewed for employment by the Respondent in May 1995.[14] The Respondent argues that Bishop and perhaps others of the eight should have any make whole remedy directed to them reduced as a result of events in and after May 1995. I find all such events sufficiently remote from the failure to hire allegations of May 1994 that those issues should be deferred to and resolved in the compliance stage of these proceedings, if necessary. Accordingly, I find none of those later events relevant to a determination of the merits of the complaint unfair labor practice allegations.[15]

Inasmuch as the Respondent makes no particular contentions respecting Bishop as an individual in 1994 not heretofore discussed, I find that it has not established an affirmative defense as to Bishop.

(6) Summary of findings respecting the Respondent's affirmative defenses

Having considered the Respondent's affirmative defenses consistent with the *Wright Line* doctrine, I have found that no general affirmative defense applicable to all the alleged discriminatees is viable. Respecting defenses specific to Bathurst, Bishop, Cameron, Lopes, and Walters, the Respondent has failed to meet its burden of persuasion that it would have declined to interview and offer employment to each and every one of these five job applicants, even if they had not engaged or been suspected by the Respondent of planning to engage in protected organizing activity.

As to individual affirmative defenses specific to Caley, Culloty, and Wheeler, I further find that the Respondent has met meet its burden of persuasion that it would have declined to interview and offer employment to any and all of these individuals, even if they had not engaged or been suspected by the Respondent of planning to engage in protected organizing activity.

4. Summary of violations found

I have found that the Respondent improperly failed to consider for employment and denied interviews and offers of employment to the following individuals because they had announced an intention to attempt to organize employees of the Respondent:

William Bathurst
Tony Bishop
Rodney Cameron
Robert Lopes
Robert Walters

This conduct violates Section 8(a)(3) and (1) as alleged in the complaint and I so find. I therefore sustain the relevant complaint allegations.

[14] In what surely must be regarded as the ultimate job interview scenario in an adversarial relationship, Bishop acting in part under the apparent compulsion of a subpoena issued by the Respondent and accompanied by union agents and union counsel arrived at the Respondent's premises and was initially met by the Respondent's agents, the Respondent's labor counsel, and a court reporter.

[15] To the extent the General Counsel and the Charging Party argue that the granting of an interview to Bishop in May 1995 indicated he was viewed as qualified by the Respondent in 1994, in agreement with the Respondent, I find the Respondent's actions at that time may be as easily explained as simply a prudent approach by the Respondent given the processing of the instant charge.

I have found that the Respondent did not improperly fail to consider for hire, deny interviews [or] to or deny offers of employment to the following individuals because they evinced support for the Union or had indicated an intention to attempt to organize employees of the Respondent:

Dan Caley,
Barry Culloty
Kyle Wheeler

Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) as alleged in the complaint as to these individuals. I shall therefore dismiss the relevant complaint allegations.

THE REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom, and take certain affirmative action in order to effectuate the purposes and policies of the Act, including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedy in *Indian Hills Care Centers*, 321 NLRB 144 (1996).

I shall direct the Respondent to offer immediate employment as plumbers to employee applicants William Bathurst, Tony Bishop, Rodney Cameron, Robert Lopes, and Robert Walters, discharging, if necessary, any plumber employees hired on or after May 6, 1994. These individuals would have accepted employment had it been offered to them by the Respondent in May and therefore the Respondent's failure to offer such employment denied each discriminitee the wages and benefits such employment would have provided. Therefore, the Respondent shall be directed to make each individual whole, with interest, for any and all losses of wages and benefits he would have received, but for the Respondent's wrongful failure to interview and offer employment to the five individuals following their application on May 5, 1994. The make-whole remedy shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.,* 231 NLRB 651 (1977), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole, I make the following conclusions of law.

1. The Respondent is and has been at all relevant times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider for hire and failing and refusing to interview and offer employment to the following plumber employee applicants because of their apparent intention to attempt to organize the Respondent's plumbing craft employees:

William Bathurst
Tony Bishop
Rodney Cameron
Robert Lopes
Robert Walters

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
5. The allegations of the complaint not specifically found to violate the Act above are without merit and shall be dismissed.

[Recommended Order omitted from publication.]